IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

KRISTOPHER AND ANGELIQUE ANDERSON, A MARRIED COUPLE IN THEIR OWN RIGHT; KRISTOPHER AND ANGELIQUE ANDERSON, AS PARENTS AND NATURAL GUARDIANS OF COOPER ANDERSON, A MINOR CHILD,
Plaintiffs/Appellants,

v.

ESCABROSA, INC., AN ARIZONA CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2018-0057
Filed October 24, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20162178
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Rabb & Rabb PLLC, Tucson
By Matthew L. Rabb and Lloyd L. Rabb
Counsel for Plaintiffs/Appellants

Jennings, Strouss & Salmon PLC, Phoenix
By John J. Egbert, Jay A. Fradkin, and R. Ryan Womack
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Judge:

¶1 Kristopher and Angelique Anderson, as a married couple and on behalf of their minor child Cooper Anderson, appeal the trial court's ruling granting summary judgment in favor of Escabrosa, Inc. They argue summary judgment was inappropriate because there were genuine issues of material fact whether (1) Escabrosa breached its duty of care as a business proprietor, (2) Escabrosa's breach was the cause of the Andersons' harm, and (3) the dangerous condition that harmed the Andersons was open and obvious. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 In reviewing a grant of summary judgment, we view all facts in the light most favorable to the non-moving party. *Timmons v. Ross Dress for Less, Inc.*, 234 Ariz. 569, ¶ 2 (App. 2014). Colossal Cave Mountain Park is located on over 2,400 acres of untouched desert and operated by Escabrosa. Most guests that come to the park visit its gift shop and reception area, which also serves as the entrance for cave tours. The reception area is separated from the open desert by a half wall, and within the reception area there is a rock formation that contains a small commemorative plaque. While visiting the park, the Andersons' four-year-old son, Cooper, was bitten by a juvenile rattlesnake hiding within the rock formation in the reception area.

¶3 The Andersons filed a complaint alleging Escabrosa[1] had been negligent by allowing on its property "an unreasonably dangerous condition that it knew of or should have known of: a juvenile rattlesnake." The Andersons therefore asserted Escabrosa was responsible for damages

[1] The complaint also named several other defendants, but those parties were dismissed from the action and are not the subject of this appeal.

arising from the snakebite, which included medical expenses, pain and suffering, and loss of earnings.

¶4 When deposed, a park employee testified that, based on his experience, snakes often use rock formations as a habitat. A second employee testified that park employees look for snakes while performing their day-to-day duties, although it is not something they "normally do." The same employee also testified he had been told to remove a snake if he saw one while completing his other job responsibilities. The park manager and operator testified that in her fifty-three years at the park she had seen rattlesnakes "two or three times a summer," although they were not a common occurrence. She also testified that she was not aware of any snake bites prior to Cooper's injury. While rattlesnakes are present in the park, there was no indication they have been seen previously in the rock formation or reception area where the bite occurred.

¶5 An expert retained by the Andersons opined that snakes take shelter in rock formations. He stated that rodents are attracted to areas like the reception area due to the presence of trash cans and vending machines, and, in turn, the rodents attract snakes. Based on the potential presence of snakes in the reception area, he would have testified at trial that the industry standard for park facilities was to remove rock formations in high-traffic areas or regularly inspect rock formations for dangerous or venomous animals.

¶6 Before trial, Escabrosa moved for summary judgment, arguing the Andersons had failed to present evidence that Escabrosa had breached its duty as a landowner and business owner. It asserted there were no facts to support a claim that the dangerous condition on its property was unreasonable because it was undisputed that Escabrosa did not have actual or constructive knowledge of the snake's presence in the rock pile. It therefore argued it had not breached its duty to protect the Andersons from unreasonable risk of harm. It further argued summary judgment was appropriate because there was no evidence to show Escabrosa's actions were the cause of the snakebite, and the rattlesnake on the property was open and obvious.

¶7 In response, the Andersons asserted "the known risk of dangerous snakes in the area . . . establishe[d] notice," and the presence of rattlesnakes in the reception area was a foreseeable condition because "the rattlesnake's natural prey would have been attracted to the area by food and trash, . . . the reception area was not entirely enclosed, . . . desert area surrounds the reception area, . . . [and Escabrosa] created a structure that

serves as a shelter or habitat for snakes." The Andersons further argued there was reasonable evidence that Escabrosa's actions (or lack thereof) had caused their injuries and the rattlesnake was not an open and obvious condition—therefore entitling them to present the case to a jury.

¶8 After oral argument, the trial court granted Escabrosa's motion for summary judgment, relying in part on *Spelbring v. Pinal County*, 135 Ariz. 493 (App. 1983). Consistent with *Spelbring*, the court concluded that Escabrosa did not have actual or constructive notice of the snake in the rock formation based solely on its knowledge that the surrounding desert contained snakes. *See id.* at 495 (plaintiff must show defendant had notice of defect itself and not of conditions producing defect in order to raise question of fact for jury). It further noted there was no evidence Escabrosa's actions had caused the snakebite. After the court entered final judgment, the Andersons filed this appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Summary Judgment

¶9 Rule 56, Ariz. R. Civ. P., mandates the entry of summary judgment "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." A motion for summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). Although the trial judge must evaluate the evidence presented by the parties to some extent, "summary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury's verdict, nor even when the trial judge believes the moving party *should* win the jury's verdict." *Id.* at 309-10. We review a grant of summary judgment de novo. *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, ¶ 12 (App. 2010).

¶10 The Andersons brought a claim for negligence, which required them to establish a duty that Escabrosa conform to a certain standard of care, a breach by Escabrosa of that standard, a causal connection between Escabrosa's conduct and the resulting injury, and actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). It is undisputed that Escabrosa owed a duty of care to the Andersons to protect them "against foreseeable and unreasonable risks of harm." *Bellezzo v. State*, 174 Ariz. 548, 550-51 (App. 1992). Nor is it disputed that the Andersons suffered actual damages

as a result of the snakebite. On appeal, the Andersons argue there were genuine issues of material fact as to the breach and causation elements of their claim.

Negligence: Breach

¶11 Generally, the determination of whether a party has breached its duty of care is a fact-intensive inquiry reserved for the jury. *See Gipson*, 214 Ariz. 141, ¶ 9. Notwithstanding the fact-based nature of this determination, in order to withstand summary judgment, the Andersons were required to present some evidence that would allow a reasonable jury to conclude Escabrosa had breached its duty. *See Orme Sch.*, 166 Ariz. at 309; *see also Stevens v. Anderson*, 75 Ariz. 331, 333-35 (1953) (to survive summary judgment party must show there will be some form of proof at trial).

¶12 In Arizona, a business owner has a duty to its invitees "to maintain its premises in a reasonably safe condition." *Woodty v. Weston's Lamplighter Motels*, 171 Ariz. 265, 268 (App. 1992). "However, a proprietor who is not directly responsible for a dangerous condition is not liable simply because an accident occurred on his property." *Chiara v. Fry's Food Stores of Ariz., Inc.*, 152 Ariz. 398, 399 (1987). Instead, as a general rule, a proprietor who did not directly create a dangerous condition may be liable only "if he had actual or constructive notice of the dangerous condition." *Id.* at 400. Notice that a dangerous condition may be a possibility is insufficient; rather, a plaintiff must show the defendant had actual or constructive knowledge "of the defect itself which occasioned the injury." *Preuss v. Sambo's of Ariz., Inc.*, 130 Ariz. 288, 289 (1981); *accord Spelbring*, 135 Ariz. at 494-95 (relying on *Preuss* to affirm grant of summary judgment).

¶13 The Andersons argue, under a general theory of liability, that "Escabrosa had ample notice of foreseeable dangerous conditions in its reception/activity area" because it is exposed to a desert area commonly known to contain venomous snakes.[2] Relying in part on *Martinez v. Woodmar IV Condominiums Homeowners Ass'n*, 189 Ariz. 206 (1997), they

[2]In their opening brief, the Andersons also argued we should apply the mode of operation rule, which, if applied, would have relieved them of their burden of showing actual or constructive notice of a specific dangerous condition. *See Chiara*, 152 Ariz. at 400-01. At oral argument in this court, however, the Andersons conceded the mode of operation rule should not apply in this case. Based on that concession, we consider the argument abandoned. *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572 (1979).

contend the foreseeability of dangerous conditions alone is sufficient to establish notice. In *Martinez*, our supreme court reversed a grant of summary judgment after the plaintiff was injured during a confrontation with gang members in the parking lot of the defendant's condominium complex. *Id.* at 207, 212. There, as the Andersons correctly note, the court recognized "[f]oreseeability of harm defines and limits the scope of conduct necessary to fulfill a land possessor's duty." *Id.* at 211. But we cannot agree *Martinez* eliminated the general notice requirement in *Preuss* or concluded foreseeability is sufficient to establish notice itself. *See generally id.* Significantly, notice did not appear to be at issue in *Martinez*, as there was evidence that the defendant "knew of the incursion by gangs in the parking lot and other common areas of its property." *Id.* at 211.

¶14 Unlike *Martinez*, where the plaintiff showed that the defendant knew the gang had been on the premises, the Andersons have failed to present evidence of Escabrosa's prior knowledge of the presence of a rattlesnake in the reception area. Instead, the Andersons essentially argue Escabrosa had notice the reception area could contain a rattlesnake because the surrounding desert produces rattlesnakes. In premises liability cases, however, our supreme court has stated a plaintiff must show the defendant had notice "of the defect itself and not of the conditions producing the defect." *Preuss*, 130 Ariz. at 290. Applied here, the Andersons must have shown Escabrosa had notice of rattlesnakes being present in the reception area—evidence that the reception area is surrounded by a desert landscape is insufficient.

¶15 We do not suggest, as Escabrosa argues, the Andersons were required to show Escabrosa's actual or constructive notice of the particular rattlesnake which bit Cooper. Instead, evidence of previous rattlesnake sightings in the reception area would have arguably been sufficient to withstand summary judgment. *See Booth v. State*, 207 Ariz. 61, ¶ 11 (App. 2004) ("Based on the testimony and exhibits offered by both sides, including the collision data presented at trial, a reasonable jury could conclude that the state had ample notice of a dangerous condition on this portion of I-40."); *see also Orme Sch.*, 166 Ariz. at 309 (standard for directed verdict and summary judgment are the same). In this case, there appears to be undisputed evidence that a rattlesnake had never been seen in the rock formation in the reception area before Cooper's injury, and no evidence of previous rattlesnake sightings in the reception area generally. And while the expert retained by the Andersons would have testified rattlesnakes were foreseeable based on the surrounding environment, there is nothing in his opinion that would have established Escabrosa had actual or constructive notice of their presence in the reception area. Because the

Andersons failed to present such evidence, under the general rule, the Andersons' claim for negligence must fail. *See Chiara*, 152 Ariz. at 400 ("proprietor may be liable for a dangerous condition produced by a third party . . . if he had actual or constructive notice of the dangerous condition").

Disposition

¶16 The Andersons have failed to present reasonable evidence in support of each element of their negligence claim. *See Gipson*, 214 Ariz. 141, ¶ 9. Accordingly, the trial court's order granting summary judgment is affirmed.[3] *See Orme Sch.*, 166 Ariz. at 309.

[3]Because we uphold the trial court's grant of summary judgment, we need not address the Andersons' remaining arguments. *See Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, ¶ 8 (App. 2014) (Arizona courts "typically decline to consider moot or abstract questions as a matter of judicial restraint.").